APPEAL NO. 170893
FILED JUNE 5, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on November 28, 2016, with the record closing on March 16, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on July 2, 2015; and (2) the claimant's impairment rating (IR) is 5%.

The claimant appealed, disputing both the MMI and IR determinations. The claimant contends that there is medical evidence to establish he needed additional treatment after the MMI date determined by the hearing officer. The respondent (carrier) responded, urging affirmance of the disputed MMI and IR determinations.

DECISION

Reversed and remanded.

The parties stipulated in part that: (1) on (date of injury), the claimant sustained a compensable injury in the form of a cervical sprain/strain and C5-6 disc protrusion; (2) the claimant's date of statutory MMI is November 24, 2016; and (3) (Dr. K) was properly appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address MMI/IR. The claimant testified that he injured his neck while carrying sheet rock to his work area. In evidence is a Benefit Dispute Agreement (DWC-24) in which the parties agreed that the compensable injury does extend to a C5-6 disc bulge/protrusion but does not extend to a C4-5 disc bulge/protrusion.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that

the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

Dr. K examined the claimant on July 2, 2015, and certified that the claimant reached MMI on July 2, 2015, with a 5% IR. Using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), Dr. K placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment for 5% for the cervical spine. This certification only considered a cervical sprain/strain. As previously noted the parties stipulated that on (date of injury), the claimant sustained a compensable injury in the form of a cervical sprain/strain and C5-6 disc protrusion. Dr. K did not consider the entire compensable injury. Accordingly, this certification cannot be adopted.

Subsequently, Dr. K re-examined the claimant on October 21, 2016, and certified that the claimant was not at MMI considering the conditions of a neck strain and cervical disc disorder with radiculopathy. After the CCH, the hearing officer sent a presiding officer's directive to order a designated doctor examination to Dr. K and requested that he provide a certification of MMI/IR that considered only a cervical sprain/strain and C5-6 disc protrusion. Dr. K examined the claimant again on December 23, 2016, and certified that the claimant reached MMI statutorily on November 24, 2016, and assigned a 19% IR using the AMA Guides. Dr. K placed the claimant in DRE Cervicothoracic Category II: Minor Impairment for 5% and further assessed 15% whole person impairment for motor and sensory loss of the median nerve below the forearm. The hearing officer found that the preponderance of the other medical evidence is contrary to the certification from Dr. K and that finding is supported by sufficient evidence. The hearing officer correctly noted in her decision that Dr. K did not provide any explanation as to why he provided a rating for sensory and motor deficits in the upper extremity, considering the compensable injury he was asked to rate did not include any upper extremity conditions.

On February 28, 2017, (Dr. N) a carrier-selected required medical examination doctor examined the claimant and certified that the claimant reached MMI on July 2, 2015, with a 5% IR. In his narrative report, Dr. N wrote that for the accepted cervical strain the claimant was at MMI on July 2, 2015, with a 5% IR. Dr. N further stated that "[the claimant] has been accepted more recently for C5-6 herniated nucleus pulposus. If that is in fact correct at that time as a work-related diagnosis, an appropriate treatment should occur, and such treatment would involve an epidural steroid injection and appropriate physical therapy, significantly more than what he has had especially after an epidural steroid injection, and he could be considered for decompression at C5-6 on

the left side following that." Dr. N further stated that the question is whether or not he needs an additional date of MMI and IR. Dr. N then explained that the claimant "likely would qualify for DRE Category III under cervicothoracic spine which is equal to 15% whole person impairment. Since he has already been placed at MMI for what would be an original work-related condition, I would ask for administrative clarification of this question and this issue." The hearing officer noted in her discussion that Dr. N included a short paragraph in his decision stating that he received clarification the C5-6 bulge was accepted, but radiculopathy was not and felt that although the claimant had evidence of evolving radiculopathy at C5-6 this was due to an ordinary disease of life as this condition did not exist at the time of the "original MMI," but did now. The last paragraph of Dr. N's report in evidence asks for administrative clarification of the conditions considered to be part of the compensable injury and does not indicate he ever received such clarification. Further, MMI remains a disputed issue and there is no requirement that the condition existed at the time of the "original MMI." However, if Dr. N wrote an addendum after receiving administrative clarification it is not included as evidence in the appeal file for review. Consequently, based on the evidence in the record the hearing officer's determination that the claimant reached MMI on July 2, 2015, with a 5% IR is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

There is one other certification from Dr. K based on an examination of March 20, 2015, in which Dr. K certified that the claimant had not yet reached MMI for the conditions of cervical radiculopathy and cervical disc herniation. As previously noted the statutory date of MMI is November 24, 2016. A cervical sprain/strain is part of the compensable injury and that condition was not considered by Dr. K in this certification and consequently it cannot be adopted.

There is one other certification in evidence from (Dr. B) a referral doctor acting in place of the treating doctor. Dr. B examined the claimant on December 15, 2015, and certified that the claimant reached MMI on July 2, 2015, and assigned a 5% IR for the sole condition of a cervical sprain/strain. This certification does not rate the entire compensable injury and cannot be adopted.

There is no other certification in evidence. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on July 2, 2015, with a 5% IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on July 2, 2015, and we remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is 5% and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. K is still qualified and available to be the designated doctor. If Dr. K is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

If Dr. K is still qualified and available to serve as the designated doctor, the hearing officer is to request that Dr. K explain why he rated sensory and motor loss of the median nerve below the forearm given that the compensable injury is a cervical sprain/strain and C5-6 disc protrusion. The hearing officer is to request Dr. K to consider and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination, and that the date of MMI cannot be later than the statutory date of MMI.

If Dr. K is no longer qualified or available to serve as a designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **XL SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge